(3) (3)

Nos. 03-1116, 03-1120

Supreme Court, U.S.
FILED
MAR 5 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, Governor of Michigan; *et al.*,
Petitioners,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Of Counsel:

STEPHEN M. DIAMOND
Professor of Law
UNIVERSITY OF MIAMI
SCHOOL OF LAW
1311 Miller Drive
Coral Gables, Florida 33146
(305) 284-2259

PAUL R. ROMAIN
805 SW Broadway
Suite 1900
Portland, Oregon 97205
(503) 228-2337

MICHAEL D. MADIGAN
Counsel of Record
KATHERINE E. BECKER
MADIGAN, DAHL &
HARLAN, P.A.
701 Fourth Avenue South,
Suite 1700
Minneapolis, Minnesota 55415
(612) 604-2000

Counsel for *Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

PARTIES TO THE PROCEEDINGS

Petitioners, Defendant-Appellees below, are State of Michigan officials including the Governor, the Michigan Attorney General, and the Chair of the Liquor Control Commission (hereafter collectively referred to as "Michigan" or the "State"). The current holders of those offices have been substituted as parties for the former office holders pursuant to Sup. Ct. R. 35.3.

Petitioner, intervening Defendant-Appellee below, is the Michigan Beer & Wine Wholesalers Association ("MB&WWA"), a trade association of the Michigan beer and wine wholesalers that intervened as a defendant in the district court.

Respondents, Plaintiffs-Appellants below, include Eleanor Heald, Ray Heald, John Arundel, Karen Brown, Richard Brown, Bonnie McMinn, Gregory Stein, Michelle Morlan, William Horwath, Margaret Christina, Robert Christina, Trisha Hopkins, Jim Hopkins and Domaine Alfred, Inc. The thirteen individual parties are Michigan residents who are wine connoisseurs, wine journalists, and wine collectors. Respondent Domaine Alfred, Inc. is a California winery.

TABLE OF CONTENTS

	Page
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THERE IS A SUBSTANTIAL CONFLICT AMONG THE FEDERAL CIRCUITS REGARDING A STATE'S RIGHT TO REGULATE THE IMPORTATION OF BEVERAGE ALCOHOL UNDER THE TWENTY-FIRST AMENDMENT	5
II. THE *HEALD* DECISION CONFLICTS WITH THE EXPRESS LANGUAGE OF THE TWENTY-FIRST AMENDMENT, THE WEBB-KENYON ACT, AND DECISIONS OF THE UNITED STATES SUPREME COURT	6
A. History Of The Twenty-first Amendment And Webb-Kenyon Act	6
B. The *Heald* Decision Is Inconsistent With Prior Decisions Of This Court Interpreting The Twenty-first Amendment	8
III. THE ISSUES INVOLVED IN THE *HEALD* CASE ARE OF NATIONAL IMPORTANCE	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES

	Page
Bacchus Imports, Ltd. v. Dias, 408 U.S. 263 (1984)	9
Bainbridge v. Turner, 311 F.3d 1004 (11th Cir. 2002)	3, 5
Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003)	3, 5, 12
Bowman v. Chicago & NNW Ry Co., 125 U.S. 465 (1888)	7
Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000), *cert. denied, sub nom., Bridenbaugh v. Carter*, 532 U.S. 1002 (2001)	3, 5, 9, 10
Brown & Williamson Tobacco Corp. v. Pataki, 320 F.3d 200 (2d Cir. 2003)	6
Buckley v. Valeo, 424 U.S. 108 (1976)	13
California Retail Liquor Dealers Ass'n v. Mid Cal Aluminum, Inc., 445 U.S. 97 (1980)	8, 10
Capital Cities Cable, Inc. v. Crisp, 476 U.S. 694 (1984)	10
Carter v. Virginia, 321 U.S. 131 (1944)	10
Clark Distilling Co. v. Western Maryland Railway Co., 242 U.S. 311 (1917)	7
Craig v. Boren, 429 U.S. 190 (1976)	8, 10
Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1966)	12
Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003)	3
Heald v. Engler, 342 F.3d 517 (6th Cir. 2003)	*passim*
Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964)	3, 5, 9
Leisy v. Hardin, 135 U.S. 100 (1890)	7
Leavitt v. Jane L., 518 U.S. 137 (1966)	12
Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938)	8

TABLE OF AUTHORITIES—Continued

	Page
North Dakota v. United States, 459 U.S. 423 (1990)	3, 10
State Bd. Of Equalization v. Young's Market Co., 299 U.S. 59 (1936)	3, 8, 10
Swedenburg v. Kelly, 2004 WL 254401 (2nd Cir. Feb. 12, 2004)	*passim*
Ziffrin v. Reeves, 308 U.S. 132 (1939)	8

STATUTES

27 U.S.C. § 122	4, 6, 7, 8

OTHER AUTHORITIES

Beer Wholesalers: Their Role and Economic Performance at 46-47 (3d ed. 1999)	2
Leonard Havion & Elizabeth Laine, *After Repeal*, 6-7 (1936)	7
Raymond B. Fosdick & Albert L. Scott, *Tavard Liquor Control*, 10-11 (1933)	7

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 21	*passim*

IN THE

Supreme Court of the United States

Nos. 03-1116, 03-1120

JENNIFER M. GRANHOLM, Governor of Michigan; *et al.*,
Petitioners,

and

MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF NATIONAL BEER WHOLESALERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Since 1938, the National Beer Wholesalers Association ("NBWA") has served as the national membership organization of the beer wholesaling industry representing over 2,200 licensed beer wholesalers.[1] Its members reside in all fifty states. In 1997, U.S. beer wholesaler direct sales

---

[1] This *amicus curiae* brief filed in support of the Petitioners was funded solely by the National Beer Wholesalers Association and authored solely by counsel for the National Beer Wholesalers Association. This brief is filed with the consent of the parties, evidence of which is submitted with this brief.

reached $30.5 Billion Dollars. Beer wholesalers employed 92,860 individuals and paid $3.4 Billion Dollars in wages. The total economic activity directly generated by beer wholesalers was $8.2 Billion Dollars. The total state and local taxes paid directly by beer wholesalers was $2.4 Billion Dollars. *See Beer Wholesalers: Their Role and Economic Performance*, at 46-47 (3d ed. 1999).

The economic activity of distributing beer stimulates other activity in the economy. Economists refer to this as the "multiplier effect". In other words, every dollar spent by wholesalers to buy such things as vehicles, equipment, computers and other goods and services represents income to other industries. Taking into account the "multiplier effect", the total direct and indirect economic contribution of beer wholesalers nationwide in 1997 was as follows: 368,010 jobs created, $10.2 Billion Dollars in wages paid, $28.4 Billion Dollars in total economic activity created, and $4.0 Billion Dollars in state and local taxes paid. *Id.* at 47. Obviously, the economic contribution of beer wholesalers is even greater today.

This case implicates the essential interests of NBWA and its members. The Sixth Circuit decision in *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) threatens to dismantle complex state regulatory systems governing alcoholic beverages that have worked remarkably well for over seventy (70) years. Through these delicately balanced and historically tested regulatory schemes, states have addressed several fundamental interests: preventing illegal sales to minors, inhibiting overly aggressive marketing and consumption, collecting taxes, creating orderly distribution and importation systems, and preventing a recurrence of the problems that led to the enactment of National Prohibition.

Specifically, the *Heald* decision puts at risk the requirement that all imported alcoholic beverages be delivered to an in-state licensee, thereby assuring effective regulation. Ordinarily, wholesalers are the in-state licensed entities through which imported alcoholic beverages must pass. Wholesalers pay excise taxes on imported product and retain records of their sales to retailers, thereby creating a transparent and accountable distribution system. They have invested large sums in creating these distribution systems in a highly regulated environment. These investments are jeopardized if the regulatory playing field is tipped against in-state licensees and out-of-state entities are permitted to ship directly to consumers.

SUMMARY OF ARGUMENT

By every test used by this Court, the Petition for Writ of Certiorari should be granted. First, there is substantial conflict among the federal circuits regarding the scope of a state's right to regulate the importation of alcoholic beverages under the Twenty-first Amendment to the United States Constitution. Specifically, the Sixth Circuit decision, as well as a similar decision in the Fifth Circuit, conflicts with decisions in the Second, Fourth, Seventh, and Eleventh Circuits. *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Dickerson v. Bailey*, 336 F.3d 388 (5th Cir. 2003); *Swedenburg v. Kelly, et al.*, 2004 WL 254401 (2nd Cir. Feb. 12, 2004); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001); *Bainbridge v. Turner*, 311 F.3d 1004 (11th Cir. 2002).

Second, the Sixth Circuit decision conflicts with (and essentially ignores) the Twenty-first Amendment, the Webb-Kenyon Act, 27 U.S.C. § 122, and numerous decisions of this Court, including, without limitation, *State Bd. Of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *North Dakota v. United States*, 495 U.S. 423 (1990).

Finally, the issues involved in the *Heald* case are of nationwide importance, as evidenced by the number of cases devoted to these issues. Fundamentally, the case involves the right of states to control and regulate the importation of alcoholic beverages into and within their borders. In recognition of historical abuses and of the social costs that flow from intemperate consumption, alcohol is one of the most heavily regulated products in the country and is accorded a unique status under our Constitution. As such, states are free to regulate the product in accordance with community norms and standards.

The *Heald* decision erodes, indeed destroys, the primary keystone of state regulatory power, namely the right under the Twenty-first Amendment to control the importation of alcoholic beverages into the State and insist on importation and distribution through licensed entities with a physical presence in the state. Without apparent regard to the consequences of its decision, the *Heald* case makes a Trojan Horse of one minor Michigan statutory provision which permits in-state wineries (which are subject to the licensing authority of the state), but not out-of-state wineries (which are outside the regulatory reach of the state), to ship direct to consumers, and thereby topples a comprehensive three-tier system governing alcoholic beverage distribution. Furthermore, the remedy not only undermines effective regulation, but discriminates against licensed in-state wholesalers and retailers, since they, unlike unlicensed out-of-state suppliers, are subject to enforceable regulations and taxation. In doing so, the Sixth Circuit decision ignored (or at least rendered irrelevant) the Twenty-first Amendment (which represents a national consensus reached by the American people just seventy years ago), a long line of decisions by this Court recognizing a state's fundamental and constitutional right to regulate alcoholic beverages, and an Act of Congress (the Webb-Kenyon Act) which explicitly grants states that right.

ARGUMENT

I. THERE IS A SUBSTANTIAL CONFLICT AMONG THE FEDERAL CIRCUITS REGARDING A STATE'S RIGHT TO REGULATE THE IMPORTATION OF BEVERAGE ALCOHOL UNDER THE TWENTY-FIRST AMENDMENT.

As noted and discussed in the Petitioners' Briefs in Support of Petition for Writ Of Certiorari, the Sixth Circuit's decision conflicts directly with decisions of the Seventh, Eleventh, and Fourth Circuit. *See Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001); *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002); *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). This conflict in and of itself justifies review by the Court.

Since the submittal of Petitioners' Briefs, the Second Circuit Court of Appeals rendered its decision in *Swedenburg v. Kelly, et. al.*, 2004 WL 254401 (2d Cir. Feb. 12, 2004). In a thoughtful and historically grounded analysis, the *Swedenburg* court, like the Seventh Circuit in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), *cert. denied sub. nom.*, *Bridenbaugh v. Carter*, 532 U.S. 1002 (2001), upheld state laws regulating the importation of alcoholic beverages by requiring that they pass through an in-state licensee. The *Swedenburg* court noted that "'[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution,' and considers each 'in the light of the other, and in the context of the issues and interests at stake in any concrete case.'" *Swedenburg, supra*, at 4 (quoting in part *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)). The court focused upon "the scope of the Twenty-first Amendment's grant of authority such that it is exempted from the effect of the dormant Commerce Clause." *Id.* This approach in consistent with the decisions of this

Court, which has never, by decision or language, suggested any contrary mode of analysis when evaluating regulations governing the importation of alcoholic beverages.

Significantly, the Second Circuit upheld New York's regulatory scheme even though it prohibited out-of-state wineries from importing and selling wine directly to consumers, while it permitted local wineries to do so. The Second Circuit expressly rejected the two-step analysis utilized by the Fifth, Sixth, and Eleventh Circuits. In pertinent part, the Sixth Circuit employed traditional dormant Commerce Clause analysis. First, the Sixth Circuit examined whether the regulation in question "affects interstate commerce in a manner either that (i) discriminates against interstate commerce, or (ii) imposes burden on interstate commerce that are in commensurate with putative local gains." *Swedenburg v. Kelly, et al.*, 2004 WL 254401, at 4 (2d Cir. Feb. 12, 2003) (quoting *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003)). Second, concluding that the regulation in question failed to pass muster, the Sixth Circuit examined whether the regulation in question implicated one of the Twenty-first Amendments "core concerns". If so, it may be "saved", notwithstanding its discriminatory effect. *Id.* As noted by the *Swedenburg* court, however, this analysis ignored (or at least rendered irrelevant) the express language of the Twenty-first Amendment, the Webb-Kenyon Act, and numerous decisions of this Court. *Swedenburg, supra*, at 4-5.

II. THE *HEALD* DECISION CONFLICTS WITH THE EXPRESS LANGUAGE OF THE TWENTY-FIRST AMENDMENT, THE WEBB-KENYON ACT, AND DECISIONS OF THE UNITED STATES SUPREME COURT.

A. History Of The Twenty-first Amendment And Webb-Kenyon Act

Until the late nineteenth century, alcoholic beverages were normally regulated at the local level. Ultimately, for a variety

of reasons, local regulation failed. Thereafter, states attempted to regulate alcoholic beverage distribution and sales. *See* Raymond B. Fosdick & Albert L. Scott, *Tavard Liquor Control*, 10-11 (1933); Leonard Havion & Elizabeth Laine, *After Repeal*, 6-7 (1936). These efforts were "thwarted by Supreme Court decisions involving the doctrine now known as the Commerce Clause." *Swedenburg, supra*, at 5 (citing *Bowman v. Chicago & NW Ry Co.*, 125 U.S. 465 (1888); *Leisy v. Hardin*, 135 U.S. 100 (1890)). States were freed from this constraint by the Webb-Kenyon Act, which was held constitutional in 1917. *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917). Until the passage of the Webb-Kenyon Act, states were effectively unable to impose their own systems for the regulation of the distribution and sale of alcoholic beverages. To do so required, and still requires, control of importation. Otherwise, orderly markets are destroyed by competition from unlicensed, unregulated, and untaxed out-of-state competitors. States never had the opportunity to demonstrate that, after the passage of the Webb-Kenyon Act, they could effectively regulate the importation, distribution and sale of alcoholic beverages. This was because of the adoption of National Prohibition in 1919. The ultimate failure of Prohibition showed that federal regulation of the distribution and sale of alcoholic beverages, without regard to local norms and standards, was also ineffective.

By 1933, it was evident to a majority of Americans that National Prohibition was a failed experiment. Subsequently, the nation ratified the Twenty-first Amendment, which represents a constitutional commitment to make permanent the policy behind the Webb-Kenyon Act: that the state be the focus of alcoholic beverage control. Leonard Harrison and Elizabeth Laine, *After Repeal*, 6-8, (1936). As observed by the *Swedenburg* court, Section 2 of the Twenty-first Amendment "effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of

alcoholic beverages from the stream of interstate commerce in to the state." *Swedenburg v. Kelly, et al.*, 2004 WL 254401, at 6 (2d Cir. Feb. 12, 2004) (quoting in part *Craig v. Boren*, 429 U.S. 190, 205-206 (1976)). Expressed in another way, Section 2 grants "the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n v. Mid Cal Aluminum, Inc.*, 445 U.S. 97, 110 (1980).

The Twenty-first Amendment embeds the Webb-Kenyon Act in the Constitution of the United States. *Craig v. Boren*, 429 U.S. 190, 205-206 (1976). By its decision, the *Heald* court rendered the Amendment essentially meaningless. However, "[t]he Amendment was not a narrow legislative delegation of federal authority; it was the will of a nation speaking through its constitutional process." *Swedenburg, supra*, at 4.

B. The *Heald* Decision Is Inconsistent With Prior Decisions Of This Court Interpreting The Twenty-First Amendment.

Shortly after its enactment, this Court recognized the broad powers conferred upon the states by the Amendment. *See, e.g., State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936) (upholding a statute that imposed a license fee on beer importers); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding a limitation on the types of blended spirits imported into the state, which was not imposed upon those produced in state); *Ziffrin v. Reeves*, 308 U.S. 132 (1939) (upholding regulation of the exportation of alcoholic beverages out of the state). Specifically, these cases upheld the states' power to regulate alcoholic beverages even when it burdens out-of-state interests vis-à-vis in-state interests. *Id.* The common thread running through these decisions is the recognition that control of importation is the essential component of the states' licensing and regulatory authority

and that the Twenty-first Amendment insulates that power from dormant Commerce Clause challenge and from claims of discriminatory treatment.

The Sixth Circuit, calling citation to earlier Twenty-first Amendment decisions "disingenuous," declared that this Court rejected these earlier decisions in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) and *Bacchus Imports, Ltd. v. Dias*, 408 U.S. 263 (1984). Contrary to the Sixth Circuit's understanding, however, *Hostetter* and *Bacchus* do not constitute the rejection of this Court's earlier jurisprudence. In *Hostetter*, New York attempted to close down an airport duty free shop, whose products were delivered to the ultimate consumer just prior to boarding and were used abroad. This Court simply held that such distribution did not fall within the express terms of the Twenty-first Amendment since consumption would not occur within the state.

In *Bacchus*, Hawaii had exempted from taxation two locally produced products, ti root brandy and pineapple wine. The exemptions had explicitly been passed and were explicitly defended by the state as exclusively motivated by a desire to aid local industry. The Twenty-first Amendment was not even cited by Hawaii until it submitted its brief to this Court. Writing the majority opinion, Justice White found this "belated" argument unconvincing.

Hostetter and *Bacchus* each presented an unusual set of facts. These cases simply did not implicate the states' interests under the Twenty-first Amendment. Certainly, no aspect of the ruling in these cases provided a carte blanche for lower federal courts to recast Twenty-first Amendment analysis or discard state regulatory schemes governing the importation, sale and distribution of alcoholic beverages. Furthermore, as noted by the *Bridenbaugh* and *Swedenburg* courts, nothing in these cases mandated dormant Commerce Clause or "core power" analysis when considering challenges to state impor-

tation regulation or to requirements that alcoholic beverages be distributed through in-state licensed entities. *See Swedenburg, supra*, at 17-21; *Bridenbaugh supra*, at 851-854; *but see Heald v. Engler*, 342, F.3d 317, 324 (6th Cir. 2003).

This Court has consistently reaffirmed the right of states under the Twenty-first Amendment to control the importation of alcoholic beverages. In *North Dakota v. United States*, 495 U.S. 423 (1990), the Court upheld labeling and reporting requirements for alcoholic beverages shipped to military bases, under concurrent jurisdiction. Justice Stevens wrote that "within the area of its jurisdiction, the state has 'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system. *Id.* at 431; *see California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *see also Capital Cities Cable, Inc. v. Crisp*, 476 U.S. 694, 712 (1984); *California Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936)." He further noted that "[i]n the interest of promoting temperance, ensuring orderly markets conditions, and raising revenue, the state established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (citing *Carter v. Virginia*, 321 U.S. 131 (1944) and *State Board of Equalization v. Young's Market, Co.*, 299 U.S. 59 (1936)).

The *Heald* Court either ignored or misinterpreted this Court's Twenty-first Amendment jurisprudence. This Court has repeatedly reaffirmed the principle that the Twenty-first Amendment authorized each state to regulate alcoholic beverages within its borders and that the Twenty-first Amendment creates "an exception to the normal operation of the Commerce Clause." *Craig v. Boren*, 429 U.S. 190, 206, n. 11 (1976).

III. THE ISSUES INVOLVED IN THE *HEALD* CASE ARE OF NATIONAL IMPORTANCE.

The *Heald* decision cripples the ability of the state to regulate alcoholic beverages by proscribing the power to control importation. In Michigan, state law requires out-of-state wineries (which are not licensed and are not subject to effective control by the state) to sell only to licensed entities. The law permits in-state wineries (which are licensed and are subject to effective control by the state) to sell, under certain circumstances, direct to consumers. Relying upon inapposite dormant Commerce Clause analysis, the Sixth Circuit found this differential treatment fatally defective, struck down the direct shipment prohibition, and essentially ignored both the Twenty-first Amendment and the effect of its decision upon complex, state regulatory systems.

While this case may involve oenophiles, it is constitutionally indistinguishable from one involving spirits or beer. There is no distinction between the importation of a highly allocated cult wine and that of an alcopop or distilled spirits. How are regulators expected to effectively police underage sales when a resourceful teenager can order distilled spirits through the mail? A state cannot effectively hold an out-of-state licensed entity accountable for such a violation of state law. Is state regulation at risk because of the existence of brew-pubs, since in-state suppliers are permitted to sell on-premise? Similarly, the logic of the opinions would further seem to apply to importation controls that result in any difference between an in-state licensee and an unlicensed out-of-state supplier, even where the purpose of that importation control is to ensure compliance with state law by requiring that all importation be to a licensed entity physically present within the state. As noted by the Second Circuit, "[p]resence ensures accountability." *See Swedenburg v. Kelly, et al.*, 2004 WL 25 4401, at 10 (2nd Cir. Feb. 12, 2004) ("all [suppliers] must either utilize the three-tier system or obtain a physical

presence from which the state can monitor and control the flow of alcohol.") Licensed, physical presence of at least one party in the chain of distribution is the cornerstone of an orderly, transparent, and accountable alcoholic beverage distribution system, and its validity has never been questioned by this Court.

The Sixth Circuit also ignores the competitive advantage that its decision confers upon out-of-state suppliers. By effectively exempting out-of-state suppliers from the regulatory reach of the state, these suppliers are free to violate a state's laws without fear of consequences. Accordingly, the inequitable outcome of the decision will be that out-of-state suppliers are accorded a benefit not enjoyed by in-state suppliers, while at the same time, states are hamstrung in the effective enforcement of their laws over out-of-state suppliers.

Finally, the *Heald* decision is of national significance because it apparently eliminates in their entirety the provisions of Michigan law which require imported alcoholic beverages to be delivered to in-state licensed entities. This remedy is ungrounded in law and unnecessarily destructive of an effective, comprehensive, and long-established state regulatory system. In *Beskind*, the Fourth Circuit found unconstitutional North Carolina's "juxtaposition" of a prohibition on direct shipments from out-of-state wineries with an exception for such shipments from in-state wineries. The Court, however, struck down only the in-state exception and left "in place the three-tiered system that North Carolina had employed since 1937 and has given every indication it wants to continue to employ." *See Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003). The Sixth Circuit ruling runs afoul of the principle that a constitutionally flawed provision must be severed from the remainder of the statute and the statute maintained insofar as it is valid. *See, e.g. Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Denver Area Educational Telecommu-*

nications Consortium, Inc. v. FFC, 518 U.S. 727 (1996); *Buckley v. Valeo*, 424 U.S. 108 (1976). One small exception to the three-tier system of distribution, even if constitutionally invalid, does not call for the dismantling of Michigan's regulatory scheme by eliminating an even-handed and essential requirement that all alcoholic beverages consumed in Michigan pass through or originate from a licensee physically present within the state.

CONCLUSION

For the reasons set forth above, Amicus Curiae NBWA respectfully requests that the Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Of Counsel:

STEPHEN M. DIAMOND
Professor of Law
UNIVERSITY OF MIAMI
SCHOOL OF LAW
1311 Miller Drive
Coral Gables, Florida 33146
(305) 284-2259

PAUL R. ROMAIN
805 SW Broadway
Suite 1900
Portland, Oregon 97205
(503) 228-2337

MICHAEL D. MADIGAN
Counsel of Record
KATHERINE E. BECKER
MADIGAN, DAHL &
HARLAN, P.A.
701 Fourth Avenue South,
Suite 1700
Minneapolis, Minnesota 55415
(612) 604-2000

Counsel for *Amicus Curiae*